

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

MARTHA VASSALLE,

Plaintiffs,

vs.

MIDLAND FUNDING, LLC., et al.,

Defendants.

Case No. 3:11-cv-00096

Hon. David A. Katz
And Related Cases:

Case No. 3:08-c-01434, N.D. Ohio

Case No. 3:10-cv-0091, N.D. Ohio

DECLARATION OF HAYLEY REYNOLDS

I, HAYLEY REYNOLDS, hereby declare as follows:

1. My name is Hayley Reynolds, I am over 21, and have never been convicted of a felony, have personal knowledge of the facts stated herein, and am competent to testify to them. The facts stated herein are true and correct.

2. I am a paralegal at the law firm Bramson, Plutzik, Mahler, & Birkhaeuser, LLP, counsel for Robert Clawson, an objector in this proceeding.

3. I obtained copies of USA Today from April 18, 2011 and April 21, 2011 which both contained a Notice of Pendency of Class Action Settlement.

4. Attached as Exhibit A is a true copy of The Notice that appeared in the Monday, April 18, 2011 edition of USA Today.

5. Attached as Exhibit B is a copy of The Notice that appeared in the Thursday, April 21, 2011 edition of USA Today.

6. I have compared the Published Notice (attached hereto as Exhibits A and B) to the Notice approved by the court on March 11, 2011 (Dkt 107-2). The Published Notice differs from the notice the Court approved. Specifically, the following court-approved language has been omitted from the Published Notice:

9. What am I giving up to receive these benefits?
By staying in the class, all of the Court's orders will apply to you, and you give Defendants and their affiliates "release." A release means you can't sue or be part of any other lawsuit against Defendants about the claims or issues in this lawsuit, or any other claims arising out of affidavits attached or executed in support of collection complaints filed against Class Members by Defendants or any of their subsidiaries or affiliates.

7. I am familiar with the files maintained by Bramson, Plutzik, Mahler, & Birkhaeuser, LLP in the Reimann v. Brachfeld case pending in Alameda County Superior Court. Attached hereto as Exhibit C is a true and correct copy of a Motion for Judgment on the Pleadings filed by Midland in that action.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 8th day of July, 2011, at Walnut Creek, California.


HAYLEY REYNOLDS

EXHIBIT A

...and deal in identifying what the deals are and which advertiser it's from. Deep links to deals from Travelzoo.com.

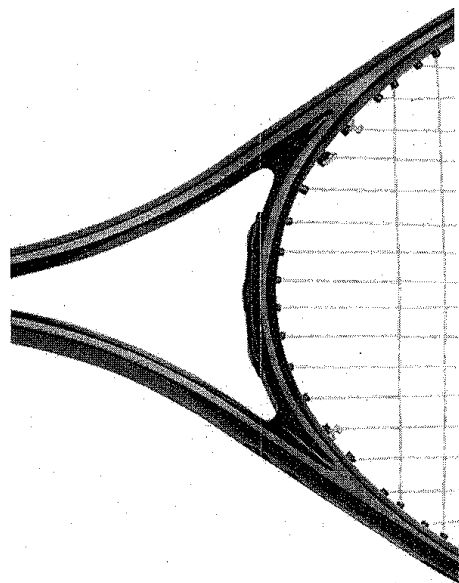
► **Cons:** Pay-to-play model: All deals are from advertisers.

► **Takeaway:** My favorite among the four because of breadth of content. Articles about the deals on Travelzoo.com are informational, although not as independent-minded as SmartTravel's.

editorial

is Week Review

Monday for scores, highlights
ennis.usatoday.com



y:



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retains and conditions

► **Takeaway:** Mediocre. Includes deals for adventurous souls, but lacks editorial voice.

cient technology, but no information on how deals measure up against competition.



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You may benefit from this class action settlement.

NOTICE OF PENDENCY OF CLASS ACTION SETTLEMENT

If Midland Credit Management, Inc., Midland Funding, LLC, or Encore Capital Group, Inc., or their affiliates, filed a lawsuit against you, PLEASE READ THIS NOTICE CAREFULLY. YOUR RIGHTS MAY BE AFFECTED.

YOU ARE HEREBY NOTIFIED that actions entitled *Midland Funding, LLC v. Andrea Brent v. Midland Credit Management, Inc.* Case No. 3:08-cv-01434; and related cases: *Martha Vassalle, et al v. Midland Funding, LLC, et al*, Case No. 3:11-cv-0096; and *Hope Franklin and Thomas Hyder v. Midland Funding, LLC et al*, Case No. 3:10-cv-0091, IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION, Judge David Katz alleging that Defendants, Midland Credit Management, Inc., Midland Funding, LLC and Encore Capital Group, Inc. (collectively "Defendants" or "Midland"), violated the Fair Debt Collection Practices Act, ("FDCPA"), as well as state common law and consumer statutes (also collectively "the Law"), by filing lawsuits against Plaintiffs between January 1, 2005 and March 11, 2011, with an affidavit that allegedly contained false information.

1. This Notice of Pendency of Class Action Settlement is to inform members of the Class of the proposed settlement; how to obtain the benefits provided for under the settlement; and to describe what to do if you are a member of the Class and want to be excluded from or object to the proposed settlement and information about the Fairness Hearing.
2. The Court has decided that everyone falling under the following definition is a Class Member: All natural persons (a) sued in the name of Midland, (b) between January 1, 2005 and March 11, 2011, (c) in any debt collection lawsuit in any court, (d) where an affidavit attesting to facts about the underlying debt was used by Midland in connection with the debt collection lawsuit. The proposed settlement provides up to \$10 to each member of the Class. The Class Payment may be claimed by submitting a properly executed Claim Form. Class Members who did not receive a Notice and Claim Form and know that they are members of the Class may file a Claim Form online at www.BrentSettlement.com. Class Members must submit their Claim Form online on or before June 1, 2011 to be considered.
3. In addition, the costs of settlement administration and notice to the Class shall be paid from the Settlement Fund.
4. The Court has named the law firm of Murray & Murray Co. LPA, Sandusky, Ohio, Dennis E. Murray and Donna Evans as Class Counsel. If you want to be represented by your own lawyer, you may hire one at your own expense. If you choose to hire your own lawyer, he or she must file an appearance by June 1, 2011. The Defendants have agreed not to oppose, and the Court has preliminarily approved, the payment to Class Counsel in the amount of \$1.5 million as attorney fees, subject to any final approval after the Fairness Hearing.
5. The terms of the proposed settlement are set forth in detail in the parties' Settlement Agreement, which is available online at www.BrentSettlement.com.
6. This proposed settlement is a compromise of disputed claims and is not an indication of liability of any sort. This Notice is not to be construed as an admission or concession of liability by Defendant.
7. In this lawsuit, the Plaintiffs claimed that Defendants violated the law by filing collection lawsuits against Plaintiffs with an affidavit that allegedly contained false information as to the personal knowledge of the affiant. The Court has already

ruled that Midland violated the FDCPA and an Ohio consumer statute by filing these affidavits. The Court has also entered an injunction against Midland, which may be extended as part of this proposed settlement.

However, the Court also dismissed a more recent related lawsuit brought against the Defendants that contained similar claims regarding affidavits filed in collection lawsuits. The Defendants continue to deny that their use of any of their affidavits violated the law. Finally, the Court has not held any of the underlying debts in the collection lawsuits to be invalid.

8. If you are a Class Member, you have the following options:

(a) If you submit a Claim Form online at www.BrentSettlement.com by June 1, 2011, you will remain in the settlement class and be entitled to receive a cash payment from the settlement fund.

(b) To exclude yourself from the settlement, you must send a letter by mail stating that you want to be excluded from *Midland Funding, LLC v. Andrea Brent v. Midland Credit Management, Inc.* Case No. 3:08-cv-01434; Case No. 3:11-cv-0096; Case No. 3:10-cv-0091 (N.D. Ohio). Be sure to include your name, address, telephone number, your signature and the case name and number. You must mail your exclusion request (postmarked by June 1, 2011) to: Brent v Midland Class Administrator, c/o Class Action Administration, Inc., PO Box 6848, Broomfield, CO 80021.

(c) If you are a Class Member, you can comment on the settlement. In order to object to the settlement you must send a letter (or legal brief) stating that you object and state any and all reasons why you think the Court should not approve the settlement. You must include the name and number of the case: *Midland Funding, LLC v. Andrea Brent v. Midland Credit Management, Inc.* Case No. 3:08-cv-01434; Case No. 3:11-cv-0096; Case No. 3:10-cv-0091 (N.D. Ohio), your name, address, telephone number and your signature. You must mail any written objection (postmarked by June 1, 2011) to: Judge David A. Katz at 1716 Spielbusch, 210 U. S. Courthouse, Toledo, OH 43624-1363. Regardless of whether you submit a written objection, you may appear at the fairness hearing at your own expense. You must also send a copy of your objection to Murray & Murray Co. LPA; Attention Rhonda Rice, 111 East Shoreline Drive, Sandusky, OH 44870-2517. Be sure to include the name and number of the case on your written objection. The Court will hold a fairness hearing on July 11, 2011 at 10:30 a.m. in the courtroom of Judge Katz. The purpose of the hearing will be for the Court to determine whether the proposed settlement is fair reasonable and adequate and in the best interests of the class and to determine the appropriate amount of compensation for the Class Counsel. At the hearing, the Court will be available to hear objections, but only as set forth in the written objections by an objector concerning the fairness of the proposed settlement. The hearing may be postponed to a later date without notice. **YOU ARE NOT REQUIRED TO ATTEND THIS HEARING.**

9. For more information you can call Class Administrator at 1-888-207-0454 or visit www.BrentSettlement.com if you have any questions.

DO NOT CONTACT THE COURT REGARDING THIS NOTICE

EXHIBIT B

ent and risk averse, a major brand (Facebook, Twitter, Zyn- ga) is where you end up," Hub- bell says. "If you're talented and not risk averse, you start your own company."

On the hunt for talent

Companies aren't just hiring at a furious clip. They are poach- ing one another's staffs for tal- ented engineers and online mar- keters, he says. At the South by Southwest Interactive festival in Austin last month, representa- tives from the likes of Adobe Systems, Foursquare and eBay roamed the show floor, hoping to recruit workers.

Social-networking firm Tagged offered limo rides from the Austin airport in hopes of landing hot prospects.

For the first time in years, the "power is with the job seeker and not the employer," says Matthew Henson, a spokesman

Fares send or a loss

lion, as passenger traffic im- proved modestly and fares rose since December.

The first quarter is usually the weakest for airlines, and ana- lysts predict that United Conti- nental, Delta and several other U.S. airlines also lost money.

AMR CEO Gerard Arpey said demand for air travel, especially for business, is still improving, "and that enabled us to keep our planes relatively full while charging higher fares."

Even with the scaled-back ca- pacity plans, Arpey said Ameri- can expected to avoid layoffs but might reduce hiring.

American's troubled labor re- lations were on display at air- ports around the country Wednesday. Union members picketed to protest stock-based compensation for several hun- dred managers while they live with small wage increases. Flight attendants held a vote and "convicted" AMR management of "managerial incompetence."

American was the first of the major airlines to report earn- ings. United Continental, South- west Airlines and JetBlue are scheduled to report today.

AMR shares fell 6 cents to \$5.64.

Corrections & Clarifications

USA TODAY is committed to accuracy. To reach us, contact Standards Editor Brent Jones at 1-800-872-7073 or e-mail accuracy@usatoday.com.

The caption on a photo of the redesigned Ford Taurus pub- lished Wednesday misidentified the model year. It is a 2013.



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NOTICES

LEGAL NOTICE

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9. For more information you can call Class Administrator at 1-888-207-0454 or visit www.BrentSettlement.com if you have any questions.

DO NOT CONTACT THE COURT REGARDING THIS NOTICE

EXHIBIT C

1 TOMIO B. NARITA (SBN 156576)
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3 San Francisco, CA 94104-4816
Telephone: (415) 283-1000
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tnarita@snllp.com
5 alugay@snllp.com

6 Attorneys for Defendants

7
8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ALAMEDA

11 JUDITH REIMANN and
MICHAEL DaRONCO, individually
12 and on behalf of all others similarly
situated,

13 Plaintiffs,

14 vs.

15 ERICA L. BRACHFELD,
16 THE BRACHFELD LAW GROUP,
P.C., MIDLAND FUNDING, LLC,
17 MIDLAND CREDIT
MANAGEMENT, LLC, and
18 MIDLAND FUNDING NCC-2
CORP. and DOES 1-100, inclusive,

19
20 Defendants.
21
22
23
24
25
26
27
28

CASE NO.: RG10-529702

**ASSIGNED FOR ALL PURPOSED
TO JUDGE Robert B. Freedman,
DEPARTMENT 20**

**NOTICE OF MOTION AND
MOTION FOR JUDGMENT ON
THE PLEADINGS BY
DEFENDANTS MIDLAND
FUNDING, LLC, MIDLAND
CREDIT MANAGEMENT, INC.
AND MIDLAND FUNDING NCC-2
CORP.; MEMORANDUM IN
SUPPORT OF MOTION**

Date: April 21, 2011

Time: 2:00 p.m.

Dept.: 20

Reservation: R-1159532

1
2 TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on April 21, 2011, at 2:00 p.m., or as soon
4 thereafter as the matter may be heard in Department 20 of this Court, located at
5 1221 Oak Street, Oakland, California, 94612, the Honorable Robert B. Freedman
6 presiding, defendants Midland Funding, LLC, Midland Credit Management, Inc.
7 (erroneously sued as "Midland Credit Management, LLC"), and Midland Funding
8 NCC-2 Corp. (collectively, the "Midland Defendants") will and hereby do move
9 this Court for an Order entering judgment on the pleadings, pursuant to California
10 common law and Section 438 of the California Code of Civil Procedure.

11 The motion is made on the grounds that the claims asserted by Plaintiffs are
12 based upon communications made in connection with state court litigation, and are
13 therefore barred as a matter of law by the California litigation privilege. The
14 claims asserted by Michael DaRonco also fail because they conflict with the
15 findings of the judgment entered against him by the El Dorado County Superior
16 Court, and are therefore barred by the principles of collateral estoppel. This
17 motion will be based upon this Notice of Motion and Motion, the accompanying
18 Memorandum of Points and Authorities and Request For Judicial Notice in
19 Support of the Motion, the records on file in this action, and all other evidence or
20 argument the Court may permit at the hearing in this matter.

21
22 DATED: March 9, 2011

SIMMONDS & NARITA LLP
TOMIO B. NARITA
ARVIN C. LUGAY

23
24
25 By: 

26 Tomio B. Narita
Attorneys for Defendants
27
28

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

When plaintiffs Judith Reimann ("Reimann") and Michael DaRonco ("DaRonco") stopped paying their credit card bills, their accounts were charged-off by their lenders and were sold to defendants Midland Funding, LLC and Midland Funding NCC-2, Corp., respectively. Collection lawsuits were filed against Reimann and DaRonco on behalf of these Midland companies by Defendant Erica L. Brachfeld ("Brachfeld") and her professional law corporation, the Brachfeld Law Group ("BLG"). The collection case against Reimann was dismissed. The action filed against DaRonco resulted in a judgment against him.

Plaintiffs then filed this case. They allege that the pre-suit "dunning" letters sent by Defendants, and the pleadings filed by Defendants, in connection with the collection lawsuits violated the Rosenthal Act (*i.e.*, section 1788.17 of the California Civil Code), as well as section 17200 of the California Business & Professions Code. DaRonco claims the judgment against him was improper, because he was never served with the complaint and there was insufficient evidence to support the judgment.

All of the claims asserted against the Midland Defendants are barred as a matter of law by the litigation privilege. The California Supreme Court has repeatedly held that a litigant may not pursue claims that are based upon the contents of pleadings or pre-litigation communications. The Rosenthal Act claims and section 17200 claims in this case are no exception.

DaRonco's claims also fail because they are barred by collateral estoppel. When it entered judgment against him, the El Dorado County Superior Court necessarily determined that DaRonco had been properly served with the complaint, that he had failed to respond to it within the time required by law, and that Midland Funding NCC-2, Corp. was entitled to a judgment against him.

1 DaRonco has never challenged the judgment or moved to set it aside. He cannot
 2 seek to collaterally attack the findings underlying the judgment by filing this
 3 action, claiming he was never served or that insufficient evidence was presented to
 4 support the claim against him.

5 Plaintiffs cannot amend their complaint to cure these fatal defects. For this
 6 reason, Defendants respectfully request that this Court issue an Order, pursuant to
 7 California common law and section 438(c)(1)(B) of the Code of Civil Procedure,
 8 granting judgment in favor of the Midland entities.¹

9 **II. ALLEGATIONS OF THE COMPLAINT**

10 The Complaint alleges that Brachfeld and BLG routinely send pre-suit
 11 “dunning” letters and file state court lawsuits on behalf of the Midland Defendants
 12 without any “meaningful attorney involvement.” *See* Complaint, ¶¶ 14-20.
 13 Plaintiffs contend that Defendants are required to submit “admissible evidence” to
 14 obtain default judgments, but they routinely submit “false and inadequate
 15 documentation” for this purpose, including affidavits provided by the Midland
 16 Defendants. *Id.* at ¶¶ 21-22.

17 Plaintiff Reimann alleges that BLG sent her a demand letter and sued her on
 18 behalf of Midland Funding, LLC in Alameda County Superior Court, and the case
 19 was dismissed when she retained an attorney and filed an answer. *Id.* at ¶¶ 26-28.

20 Plaintiff DaRonco alleges that BLG sued him on behalf of Midland Funding
 21 NCC-2, Corp. in El Dorado County Superior Court, and Defendants subsequently
 22 obtained a default judgment and garnished his wages. *Id.* at ¶ 29. DaRonco says
 23 the judgment was obtained based upon a false affidavit submitted by an agent of
 24 the Midland Defendants, and that his wages were garnished despite the fact that he
 25 “was never served and was unaware of the lawsuit against him. . . .” *Id.*

26
 27 ¹ The Midland Entities will also file a joinder in the motion for judgment on
 28 the pleadings that will be filed concurrently by Brachfeld and BLG.

Contrary to the allegations by DaRonco, however, records of the El Dorado County Superior Court reflect when it entered judgment against him on May 13, 2009, the court found that he had been properly served with the collection complaint, that he had failed to appear and respond to the complaint within the time required by law, and that Midland Funding NCC-2 Corp. was entitled to judgment against him in the amount of \$6,836.65. *See* Request For Judicial Notice In Support of Defendants' Motion For Judgment On The Pleadings (hereinafter "RJN"), at Ex. C. DaRonco was served with the writ of execution that issued when his wages were garnished, but he never objected. *Id.* at Exs. D and E.

III. ARGUMENT

A. Standards For a Motion For Judgment on the Pleadings

The Court may grant a statutory motion for judgment on the pleadings, as to the entire complaint or "as to any of the causes of action" in the complaint, where "[t]he complaint does not state facts sufficient to constitute a cause of action against [the] defendant." *See* Cal. Code Civ. Proc. §§ 438(c)(1)(B)(ii), 438(c)(2)(A); *see also* *Kapsimallis v. Allstate Ins. Co.*, 104 Cal. App. 4th 667, 672 (2002) (motion for judgment on pleadings is equivalent to demurrer). Similarly,

[i]n ruling on a common law motion for judgment on the pleadings made by a defendant, a trial court determines what has been called a pure question of law . . . but what is in fact a mixed question of law and fact that is predominantly legal: Does the plaintiff's complaint state facts sufficient to constitute a cause of action against the defendant? . . . In so doing, the trial court generally confines itself to the complaint and accepts as true all material facts alleged therein. . . . As appropriate, however, it may extend its consideration to matters that are subject to judicial notice. . . . A common law motion for judgment on the pleadings 'ha[s] the purpose and effect of a general demurrer.'

See *Smiley v. Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 145-46 (1995); *accord* *Gerawan Farming, Inc. v. Lyons*, 24 Cal. 4th 468, 515 (2000). Even though the Court accepts as true all "material facts properly pleaded," it does not accept as true "contentions, deductions or conclusions of fact or law." *Serrano v.*

1 accept as true “contentions, deductions or conclusions of fact or law.” *Serrano v.*
 2 *Priest*, 5 Cal. 3d 584, 591 (1971). A motion for judgment on the pleadings may,
 3 and should be, granted without leave to amend when amendment would be futile;
 4 the party opposing the motion bears the burden of proving that any defect can be
 5 cured. *See* Cal. Code Civ. Proc. § 438(h)(1); *Camacho v. Automobile Club of So.*
 6 *Calif.*, 142 Cal. App. 4th 1394, 1398 n.4 (2006); *Baughman v. State of Calif.*, 38
 7 Cal. App. 4th 182, 187 (1995); *Vallette v. Fireman’s Fund Ins. Co.*, 18 Cal. App.
 8 4th 680, 685 (1993).

9 **B. The Litigation Privilege Is Absolute And Applies To All Claims**
 10 **Based On Communications Made In Connection With Litigation**

11 The Complaint asserts claims against Defendants under the Rosenthal Act,
 12 Cal. Civ. Code § 1788.17, as well as claims under section 17200 of the California
 13 Business & Professions Code. All of the claims are based upon statements
 14 allegedly made by Brachfeld, BLG or the Midland Defendants in connection with
 15 the collection lawsuits filed against Plaintiffs. The litigation privilege bars these
 16 claims as a matter of law. Judgment on the pleadings for the Midland Defendants
 17 is proper.

18 “For well over a century, communications with ‘some relation’ to judicial
 19 proceedings have been absolutely immune from tort liability by the privilege
 20 codified as section 47(b).” *Rubin v. Green*, 4 Cal. 4th 1187, 1193 (1993).² The
 21 principal purpose of the privilege is “to afford litigants and witnesses the utmost
 22 freedom of access to the courts without fear of being harassed subsequently by
 23 derivative tort actions.” *Silberg v. Anderson*, 50 Cal. 3d 205, 213 (1990) (citations
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25
 26 ² Section 47(b) of the California Civil Code provides in relevant part as
 27 follows: “A privileged publication or broadcast is one made: . . . (b) In any (1)
 28 legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding
 authorized by law . . .” Cal. Civ. Code § 47(b).

omitted). The usual formulation of the elements of the privilege was stated in *Silberg* as follows:

The privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Id. at 212.

The Midland Defendants allegedly violated state law by filing collection complaints that were prepared without proper attorney review, and by submitting a “false” affidavit in the case filed against DaRonco. But the California Supreme Court has declared that the contents of all pleadings and process involved in any litigation are privileged communications and may not form the basis of any claim. *See Rusheen v. Cohen*, 37 Cal. 4th 1048, 1058 (2006) (privilege applies to false or perjurious testimony or pleadings); *Rubin*, 4 Cal. 4th at 1195 (privilege barred claims based on contents of pleadings and amended pleadings).

In addition to the pleadings themselves, any pre-litigation letters or communicative conduct, such as the act of filing of pleadings or the service of process, is also privileged and may not form the basis of any claim. *See, e.g., Silberg*, 50 Cal. 3d at 212 (privilege “applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, **even though the publication is made outside the courtroom and no function of the court or its officers is involved.**” (emphasis supplied); *Rusheen*, 37 Cal. 4th at 1057 (privilege “is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards. (citation)”); *Rubin*, 4 Cal. 4th at 1195-96 (privilege covered communications made by attorneys in anticipation of suit, as well as contents of pleading and amended pleadings).³

³ Numerous decisions are in accord. *See, e.g., Daniels v. Robbins*, 182 Cal. App. 4th 204, 216 (2010) (privilege barred claims against attorneys “being sued for

1 Because the application of the privilege is essential to ensuring the integrity
 2 of the judicial process, California courts have given the privilege an expansive
 3 reach, using it to bar both statutory and tort causes of action (with the exception of
 4 malicious prosecution claims). *See Silberg*, 50 Cal. 3d at 215-16.⁴ The
 5 compelling policy reasons underling the privilege – allowing for zealous advocacy
 6 by attorneys, and free access to the courts by litigants and witnesses – have led the
 7 California Supreme Court to observe that no claim – whether statutory, common
 8 law, or even **constitutional** – can trump the privilege, regardless of the “label”
 9 used by the plaintiff. *See Jacob B.*, 40 Cal. 4th at 962 (claim based on letter sent
 10 in connection with litigation was barred: the privilege furthers “the vital public

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 15 filing a complaint . . . and for filing other documents . . . in the course of the
 16 lawsuit”); *Cabral v. Martins*, 177 Cal. App. 4th 471, 485 (2009) (“The privilege
 17 applies to communications relative to the defense of an action as well as those relative
 18 to its filing and prosecution.”); *Feldman v. 1100 Park Lane Assocs.*, 160 Cal. App.
 19 4th 1467, 1484-86 (2008) (“filing of the unlawful detainer action clearly fell within
 20 the litigation privilege”); *Contemporary Servs. Corp. v. Staff Pro., Inc.*, 152 Cal. App.
 21 4th 1043, 1055 (2007) (affirming anti-SLAPP ruling: “Plaintiffs’ claims are based
 22 on defendants’ acts of filing the complaint in the underlying action . . .”); *Kashian*
 23 *v. Harriman*, 98 Cal. App. 4th 892, 917 (2002) (privilege applies to communicative
 24 conduct, including filing of allegedly meritless lawsuits on behalf of sham plaintiffs).

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1 policy of affording free access to the courts and facilitating the crucial functions of
 2 the finder of fact.”) (citations omitted).⁵

3 Plaintiffs have not identified any conduct by the Midland entities – other
 4 than sending pre-suit letters and filing suit using allegedly improper pleadings –
 5 that caused them any harm. None of the claims can escape the absolute bar of the
 6 privilege. The California Supreme Court has repeatedly held that section 17200
 7 claims must fail if they are based on statements made in connection with litigation.
 8 *See, e.g., Olszewski*, 30 Cal. 4th at 831-32; *Rubin*, 4 Cal. 4th at 1193.

9 C. The Rosenthal Act Claim Is Not Exempted From The Litigation 10 Privilege

11 Plaintiffs will undoubtedly argue that the Rosenthal Act claim should be
 12 exempted from the bar of the litigation privilege. As explained below, this
 13 argument must fail.

14 The California Supreme Court has recognized a narrow exception to the
 15 litigation privilege for those rare cases where a plaintiff seeks to enforce a statute
 16 that “is **more specific** than the litigation privilege **and would be significantly or**
 17 **wholly inoperable** if its enforcement were barred when in conflict with the
 18 privilege.” *Action Apartment Assoc. v. City of Santa Monica*, 41 Cal. 4th 1232,
 19 1246 (2007) (emphasis added) (observing that certain statutes relating to perjury
 20 and attorney misconduct had been exempt from privilege); *G.R. v. Intelligator*,
 21 185 Cal. App. 4th 606, 618-19 (2010) (Rule 1.20 of the California Rules of Court
 22 would not be eviscerated if litigation privilege barred tort claim based on violation

23
 24 ⁵ *See also Rusheen*, 37 Cal. 4th at 1064 (privilege encourages attorneys to
 25 zealously protect their clients’ interests: “It is desirable to create an absolute
 26 privilege ... not because we desire to protect the shady practitioner, but because we
 27 do not want the honest one to have to be concerned with [subsequent derivative]
 28 actions . . .”) (citations omitted); *Silberg*, 50 Cal. 3d at 215 (rejecting the “interests
 of justice” exception to the privilege: “To effectuate its vital purposes, the litigation
 privilege is held to be absolute in nature.”) (citations omitted).

1 of Rule); *Cabral v. Martins*, 177 Cal. App. 4th 471, 488-89 (2009) (application of
 2 litigation privilege would not eviscerate child support evasion statutes).⁶

3 The claim under section 1788.17 of the Civil Code does not fall within this
 4 narrow exception recognized in *Action Apartment*. Section 1788.17 is not more
 5 specific than the litigation privilege, nor would it be significantly or wholly
 6 inoperable if the privilege were to apply in the context of this case.

7 Section 1788.17 of the Rosenthal Act is not more specific than the privilege,
 8 because it does not expressly regulate the contents of communications made in
 9 connection with state court litigation. Rather, section 1788.17 incorporates by
 10 reference certain sections of the federal statute, the Fair Debt Collection Practices
 11 Act, 15 U.S.C. § 1692, *et seq.* ("FDCPA"), and it makes a violation of those
 12 sections into a violation of state law. *See* Cal. Civ. Code § 1788.17.⁷

13 Though not binding, the Midland Defendants submit that the reasoning
 14 employed in *Reyes v. Kensosian & Miele*, 525 F. Supp. 2d 1158 (N.D. Cal. 2007),
 15 is persuasive on this point. The plaintiff in *Reyes* alleged that defendants had
 16 violated the Rosenthal Act by falsely alleging in a complaint that the consumer
 17 owed a debt, and falsely claiming defendants were entitled to recover attorneys'
 18 fees. *See Reyes*, 525 F. Supp. 2d at 1160. In granting the motion to dismiss the

19
 20 ⁶ *But see Komarova v. National Credit Acceptance, Inc.*, 175 Cal. App. 4th 324
 21 (2009) (holding that, on the facts of that case, the specific subsections of the
 22 Rosenthal Act at issue, *i.e.*, sections 1788.11, 1788.12 and 1788.15 of the Civil Code,
 would conflict with the privilege).

23 ⁷ Section 1788.17 provides in relevant part as follows: "Notwithstanding any
 24 other provision of this title, every debt collector collecting or attempting to collect a
 25 consumer debt shall comply with the provisions of Sections 1692b to 1692j,
 26 inclusive, of, and shall be subject to the remedies in Section 1692k of, Title 15 of the
 27 United States Code. However, subsection (11) of Section 1692e and Section 1692g
 28 shall not apply to any person specified in paragraphs (A) and (B) of subsection (6) of
 Section 1692a of Title 15 of the United States Code or that person's principal." *See*
 Cal Civ. Code §1788.17.

1 claim, *Reyes* court concluded that the Rosenthal Act does not explicitly regulate
2 the contents of complaints and other papers filed in collection litigation, and
3 therefore it was not irreconcilable with the litigation privilege. The court observed
4 in *Reyes*:

5 **The [Rosenthal Act] does not explicitly regulate the content of**
6 **complaints or other pleadings that are transmitted in connection**
7 **with an actual legal proceeding and only prohibits the use of the**
8 **courts as a means to collect a debt in a few specific ways, none of**
9 **which are at issue here. . . . The application of the litigation**
10 **privilege to the communication at issue in this case would not,**
11 **therefore, vitiate the [Rosenthal Act] and render it meaningless as**
12 **was found in *Oei*.**

13 *Reyes*, 525 F. Supp. 2d at 1164 (emphasis added).

14 Here, like *Reyes*, the Rosenthal Act claims are based on the pleadings filed
15 in the collection actions against Plaintiffs, and letters sent in connection with those
16 suits. The claims do not fall within the narrow exception recognized by *Action*
17 *Apartment*, because section 1788.17 of the Civil Code does not expressly regulate
18 statements made in connection with litigation, and is not more specific than the
19 litigation privilege. Nor would section 1788.17 be rendered significantly
20 inoperable if the privilege applied to the letters and pleadings at issue in this case.
21 To the contrary, section 1788.17 incorporates by reference several subsections of
22 the FDCPA. It thus prohibits a host of improper debt collection conduct and
23 communications which are wholly unrelated to pre-suit demand letters and state
24 court pleadings. The Rosenthal Act claim is barred by the privilege and must fail.

25 **D. DaRonco's Claims Are Barred By The Principles Of**
26 **Collateral Estoppel**

27 The claims asserted by DaRonco fail, because they improperly seek to
28 disrupt the findings underlying the judgment entered by the El Dorado County
Superior Court in favor of Midland Funding NCC-2 Corp. Such claims are barred
as a matter of law by principles of collateral estoppel.

DaRonco may not pursue claims in this action which conflict with the
findings of the court that he was properly served with the state court complaint,

1 further fact-finding function to be performed. Collateral estoppel ... has the
2 dual purpose of protecting litigants from the burden of relitigating an
identical issue with the same party or his privy and of promoting judicial
economy, by preventing needless litigation.

3 *Murray v. Alaska Airlines, Inc.*, 50 Cal. 4th 860, 864 (2010) (citations, quotation
4 marks and footnotes omitted). Where there is a subsequent action between two
5 parties involving different claims, collateral estoppel “operates as an estoppel or
6 conclusive adjudication as to such issues in the second action which were actually
7 litigated and determined in the first action.” *Id.* at 867.

8 Da Ronco may argue that the judgment should not have preclusive effect,
9 because it was entered by default. He would be mistaken. California law is clear
10 that a default judgment will satisfy the “actually litigated” requirement of
11 collateral estoppel as to all issues that were necessary to the entry of the judgment.
12 *See, e.g., People v. Simms*, 32 Cal. 3d 468, 481 (1982) (“Even a judgment of
13 default in a civil proceeding is res judicata as to all issues aptly pleaded in the
14 complaint and defendant is estopped from denying in a subsequent action any
15 allegations contained in the former complaint”) (internal quotation marks omitted),
16 *citing Fitzgerald v. Herzer*, 78 Cal. App. 2d 127, 131 (1947).

17 The judgment has preclusive effect, even if it was entered by default
18 because a litigant never responded to the complaint. *See, e.g., Fitzgerald*, 78 Cal.
19 App. 2d at 132 (“A judgment by default is as conclusive as to the issues tendered
20 by the complaint as if it had been rendered after answer filed and trial had on
21 allegations denied by the answer.”).

22 Here, DaRonco’s claims are barred by collateral estoppel. He seeks to re-
23 litigate issues that were conclusively established against him by the El Dorado
24 County Superior Court. The default judgment was based upon a finding that he
25 was served with the complaint and that he failed to respond to it. The judgment
26 conclusively establishes that Midland Funding NCC-2 Corp. is entitled to recover
27 the judgment amount against him. DaRonco cannot pursue a Rosenthal Act claim,
28

1 was served with the complaint and that he failed to respond to it. The judgment
2 conclusively establishes that Midland Funding NCC-2 Corp. is entitled to recover
3 the judgment amount against him. DaRonco cannot pursue a Rosenthal Act claim,
4 or a derivative claim under section 17200, which seeks to adjudicate that he was
5 not served with the complaint, or that there was insufficient "admissible" evidence
6 offered in the prior action to support entry of a judgment.

7 **IV. CONCLUSION**

8 Plaintiffs' Rosenthal Act claims are based upon communications allegedly
9 made by in connection with the state court collection litigation, and are therefore
10 barred as a matter of law by the litigation privilege. All of DaRonco's claims are
11 barred by principles of collateral estoppel. Plaintiffs cannot amend their pleading,
12 so the motion to dismiss should be granted without leave to amend.

13
14 DATED: March 9, 2011

SIMMONDS & NARITA LLP
TOMIO B. NARITA
ARVIN C. LUGAY

15
16
17 By: 

18 Tomio B. Narita
19 Attorneys for Defendants
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PROOF OF SERVICE

I, the undersigned, declare:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 44 Montgomery Street, Suite 3010, San Francisco, California 94104-4816.

I am readily familiar with the business practices of my employer, Simmonds & Narita LLP, for the collection and processing of correspondence by FedEx Overnight Delivery and that said correspondence is delivered to an authorized representative of the courier services with delivery fees provided for in the ordinary course of business.

On this date, I served a copy of the following document:

**1) NOTICE OF MOTION AND MOTION FOR JUDGMENT
ON THE PLEADINGS BY DEFENDANTS MIDLAND
FUNDING, LLC, MIDLAND CREDIT MANAGEMENT,
INC. AND MIDLAND FUNDING NCC-2 CORP.;
MEMORANDUM IN SUPPORT OF MOTION**

by causing such document to be placed in a sealed envelope for collection and delivery by Federal Express to the addressees indicated below:

VIA FEDERAL EXPRESS

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on this 9th day of March, 2011.



Lorena Ho